ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. No decision of this Court or of any court of appeals authorizes a district court in a situation such as this to disregard the court of appeals' express order that the case be dismissed on remand. Contrary to petitioner's claim (Pet. 14), there is no "[d]irect [c]onflict" with this Court's "*Quern-Sprague-Wells Fargo* line of cases." Pet. 11, 18.[2] None of those cases presented circumstances like those at issue here, in which the prior court's opinion discussed the matter in question and the mandate specifically directed dismissal of the case.

In *Quern* v. *Jordan*, 440 U.S. 332 (1979), the Court addressed the scope of its earlier remand in *Edelman* v. *Jordan*, 415 U.S. 651 (1974). See *Quern*, 440 U.S. at 347 n.18. The Court noted the general rule that "[o]n remand, the 'Circuit Court may consider and decide any matters *left open* by the mandate of this court.'" *Ibid.* (quoting *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895)) (emphasis added). The Court held that the mandate in *Edelman* had not foreclosed the lower courts' consideration of other possible forms of relief because the mandate had simply remanded "for further proceedings consistent with this opinion." *Ibid.* (quoting *Edelman*, 415 U.S. at 678). Similarly, in *Wells Fargo & Co.* v. *Taylor*, 254 U.S. 175 (1920), the Court emphasized that the district court "was bound to give effect to the decision and mandate of the Circuit Court of Appeals."

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[2] *Quern* v. *Jordan*, 440 U.S. 332 (1979); *Sprague* v. *Ticonic Nat'l Bank*, 307 U.S. 161 (1939); *Wells Fargo & Co.* v. *Taylor*, 254 U.S. 175 (1920).

Id. at 181. The Court held that amendment after remand from the court of appeals was appropriate on the facts of that case because the court of appeals' mandate "*did not order the bill dismissed nor give any direction even impliedly making against the amendment.*" *Id.* at 182 (emphasis added).[3]

Here, in contrast to the cases relied upon by petitioner, the court of appeals' mandate specifically required the district court "to dismiss this case," Pet. App. 36, and consequently left nothing for the district court to do but enter a judgment of dismissal. See *Stamper* v. *Baskerville*, 724 F.2d 1106, 1108 (4th Cir. 1984) ("Once an order to dismiss is received, any action by the lower court other than immediate and complete dismissal is by definition inconsistent with—and therefore a violation of—the order."). It is clear, moreover, that the court of appeals' mandate of dismissal was not the product of oversight. Rather, the court of appeals specifically noted petitioner's argument with respect to *McAnnulty*, and refused to consider that alternative theory, holding that petitioner "did not present this theory to the district court" and had therefore waived it. Pet. App. 29 n.*.

Finally, if the court of appeals had not intended its mandate in the first appeal to foreclose amendment, it would have said so on the second appeal. Cf. *Wells Fargo*, 254 U.S. at 181 (noting that, if the appellate court had intended, on the first appeal, to leave "nothing open

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[3] *Sprague* is even less relevant. In that case, the Court held simply that a mandate resolving the merits of a claim did not cover the entirely "collateral * * * and independent" question whether attorneys' fees should be awarded, an issue that the Court observed was better resolved after "final disposition of * * * [the] entire process including appeal." 307 U.S. at 168-169 (quotation marks omitted).

to the District Court but to dismiss the bill," then "the Circuit Court of Appeals on the second appeal hardly would have failed to enforce its prior decision"). Instead, the court of appeals reiterated that its prior opinion held that petitioner "had not properly raised" the *McAnnulty* issue before the district court "and therefore had not preserved that issue for consideration on appeal." Pet. App. 9. The court of appeals' decision on the second appeal leaves no doubt that it intended what it said when its first mandate directed the district court to "dismiss this case." *Id.* at 36. See *id.* at 9 ("to comply with our mandate, the district court could only dismiss the case").[4]

2. Notwithstanding the clarity of the court of appeals' mandate, petitioner argues that the district court was free to disregard that mandate and allow amendment of petitioner's complaint. That assertion is based entirely on petitioner's contentions that there is no requirement to plead affirmatively the precise basis of the court's subject matter jurisdiction as long as the facts supporting jurisdiction are alleged, see Pet. 11-12 (citing Fed. R. Civ. P. 8(a)(1)), and that, pursuant to 28 U.S.C. 1653, amendment to make explicit a basis of "subject matter jurisdiction" that was already implicit must be liberally allowed, even in the court of appeals, Pet. 12-13.

Even assuming, as petitioner contends, that courts generally have a "duty" pursuant to Rule 8(a) and 28

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[4] Indeed, petitioner's first petition for a writ of certiorari reflects that petitioner also realized at the time of the Fourth Circuit's first decision that the court of appeals' opinion would preclude petitioner from pursuing an argument based on *McAnnulty*. Thus, petitioner urged this Court to review "[t]he Fourth Circuit's exclusion of the *McAnnulty* Doctrine in its jurisdictional analysis." 04-40 Pet. 10.

U.S.C. 1653 to "remedy inadequate jurisdictional allegations" on appeal, Pet. 12, and that the court of appeals should therefore have permitted petitioner to advance its new *McAnnulty* claim on appeal, that would suggest at most that the court of appeals' prior decision refusing to consider the *McAnnulty* claim was in error. The proper remedy for an allegedly erroneous court of appeals decision is further appellate review by way of rehearing or certiorari, not a request to the district court to disregard the court of appeals' mandate. Although petitioner did seek further review of the first decision, this Court denied the petition for certiorari, and that should have been the end of the matter. To be sure, as a general rule "Supreme Court review of a final judgment opens up the entire case, including all relevant interlocutory orders that may have been entered by the court of appeals or the district court." Robert L. Stern et al., *Supreme Court Practice* 75 (8th ed. 2002). But that rule does not apply here, because the court of appeals' prior decision directing that the case be dismissed was not "interlocutory." There is no purpose to be served by allowing petitioner to have a second bite at the apple following the district court's faithful execution of the court of appeals' mandate.

In any event, the premise of petitioner's argument—that *McAnnulty* provides an "alternative ground for jurisdiction" as to which Section 1653 applies (Pet. 10)—is incorrect. Whatever the scope and continued relevance of *McAnnulty* in light of Congress's enactment of the APA,[5] that decision by this Court does not

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[5] We note that *McAnnulty* itself involved agency conduct that would have satisfied the "final agency action" requirement, see *McAnnulty*, 187 U.S. at 98-99 (order of the Postmaster General prohibiting delivery of letters), as have the court of appeals decisions applying *McAnnulty*

confer subject-matter jurisdiction on the district courts. Indeed, no judicial decision could do so. See *Exxon Mobil Corp.* v *Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2617 (2005) (it is a "bedrock principle that federal courts have no jurisdiction without *statutory* authorization") (emphasis added).

Rather, judicial review of agency action, whether pursuant to the APA or any "nonstatutory" theory of review like *McAnnulty*, must rely for its jurisdictional basis on 28 U.S.C. 1331. As this Court has held, "the APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action." *Califano* v. *Sanders*, 430 U.S. 99, 107 (1977). The APA instead provides a cause of action, *Air Courier Conference of Am.* v. *American Postal Workers Union*, 498 U.S. 517, 523 n.3 (1991), jurisdiction over which is based on Section 1331, *Andrus* v. *Charlestone Stone Prods. Co.*, 436 U.S. 604, 607-608 n.6 (1978).[6] Similarly,

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subsequent to the APA's adoption, see *Aid Ass'n for Lutherans* v. *United States Postal Serv.*, 321 F.3d 1166, 1170 (D.C. Cir. 2003) (Postal Service determination that particular materials were not eligible for reduced postage rate); *Chamber of Commerce of the United States* v. *Reich*, 74 F.3d 1322, 1324-1325 (D.C. Cir. 1996) (executive order and implementing regulations concerning replacement of striking workers); *B.C. Morton Int'l Corp.* v. *FDIC*, 305 F.2d 692 (1st Cir. 1962) (determination that certificates of deposit did not qualify for FDIC insurance). Thus, it is doubtful that *McAnnulty* could serve as a basis for review of actions, such as those here, that would not satisfy the APA's final agency action requirement. But see *Rhode Island Dep't of Envtl. Mgmt.* v. *United States*, 304 F.3d 31, 41 (1st Cir. 2002) (stating, without reference to *McAnnulty*, that "the absence of 'final agency action'" did not defeat the State's claim for nonstatutory review).

[6] The failure of an APA claim is sometimes referred to in jurisdictional terms because the APA includes a waiver of the United States' sovereign immunity, see *Department of the Army* v. *Blue Fox, Inc.*, 525 U.S. 255, 260-261 (1999), and, thus, the merits and jurisdictional

any "nonstatutory review action" would have to "find[] its jurisdictional toehold in the general grant of federal question jurisdiction of 28 U.S.C. § 1331." *Rhode Island Dep't of Envtl. Mgmt.* v. *United States*, 304 F.3d 31, 42 (1st Cir. 2002). In other words, even assuming *arguendo* that *McAnnulty* retains any vitality after the APA's enactment, it would merely supply a cause of action for judicial review of agency action, not an independent basis for subject-matter jurisdiction.

Thus, petitioner's reliance on Section 1653 must fail. It is well established that Section 1653 "does not allow a plaintiff to amend its complaint to substitute a *new cause of action* over which there is subject-matter jurisdiction for one in which there is not." *Advani Enters., Inc.* v. *Underwriters at Lloyds*, 140 F.3d 157, 161 (2d Cir. 1998) (emphasis added). See *Whitmire* v. *Victus Ltd.*, 212 F.3d 885, 888 (5th Cir. 2000) (plaintiff may not add "new claims"); *Kiser* v. *General Elec. Corp.*, 831 F.2d 423, 428 (3d Cir. 1987) (amendment permissible because it would "not affect Kiser's tactics or *case theories*") (emphasis added). Indeed, petitioner does not argue to the contrary that Section 1653 would afford a right to add a new cause of action.

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inquiries become conflated, see, *e.g.*, *Bowen* v. *Massachusetts*, 487 U.S. 879, 891 n. 16 (1988) ("it is common ground that if review is proper under the APA, the District Court had jurisdiction under 28 U.S.C. § 1331"). It is that sense in which the court of appeals appears to have used the phrase "subject matter jurisdiction." Pet. App. 31-32.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
ANTHONY J. STEINMEYER
ROBERT D. KAMENSHINE
Attorneys

DECEMBER 2005

No. 05-376

In The Supreme Court of the United States

INVENTION SUBMISSION CORPORATION,
a Pennsylvania Corporation,

Petitioner,

v.

JONATHAN W. DUDAS, Under Secretary of Commerce for Intellectual Property and Director, United States Patent and Trademark Office, U.S. Department of Commerce, in his official capacity,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF FOR PETITIONER

EDWARD B. FRIEDMAN
Counsel of Record
J. STEPHEN PURCUPILE
FRIEDMAN AND FRIEDMAN
900 Fifth Avenue
Pittsburgh, PA 15219
Tel. (412) 261-5834
Fax (412) 261-0350

RICHARD C. SULLIVAN, JR.
REEDSMITH, LLP
Suite 1400
3110 Fairview Park Drive
Falls Church, VA 22042-3844
Tel. (703) 641-4200
Fax (703) 641-4340

Attorneys for Petitioner
Invention Submission Corporation

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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1. The Fourth Circuit's Decision To Extinguish The District Court's Authority To Permit Curative Amendment As To Jurisdiction On Remand Conflicts With Decisions In Other Circuits[1]

As a general rule, unless an appellate mandate constitutes a final decision on the merits, a district court is to exercise its discretion on remand to allow curative amendments.[2] *Rogers v. Hill*, 289 U.S. 582, 588, 53 S. Ct. 731, 734, 77 L. Ed. 1385, 1389 (1933). The exercise of the district court's discretion in granting leave to amend after remand must be in accordance with the liberal policy of amendment set forth in Rule 15(a). *Nguyen v. U.S.*, 792 F.2d 1500 (9th Cir. 1986). In interpreting the scope of the mandate from its previous decision dated February 11, 2004, the Fourth Circuit held that an order of dismissal under Rule 12(b)(1) "precludes the lower court from taking any further action other than dismissal, for to do so would involve retaining jurisdiction." *Invention Submission Corp. v. Dudas*, 413 F.3d 411, 415 (4th Cir. 2005); App. 9. This interpretation presents a clear conflict with § 1653 of the Judicial Code, general rules of civil practice, as well as with decisions in other Circuits which have allowed

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[1] The Fourth Circuit's previous decision dated February 11, 2004 vacated the district court's order and supporting opinion, and remanded with instruction to dismiss this case under Federal Rule 12(b)(1). The decision which is the subject of this Petition for Writ of Certiorari involves the Fourth Circuit's interpretation of its mandate as set forth in its opinion dated June 24, 2005.

[2] Pursuant to Fed. R. Civ. P. 41(b) a dismissal mandate under Rule 12(b)(1) for lack of subject matter jurisdiction cannot constitute an adjudication on the merits.

amendment to plead alternative grounds for jurisdiction after dismissal.

The Fourth Circuit's determination that a dismissal under Rule 12(b)(1) terminates the district court's discretion to consider curative amendments has been rejected by most courts addressing the issue. The majority rule is that Rule 15, in conjunction with § 1653 of the Judicial Code, allows for amendment after dismissal in order to cure defective allegations of subject matter jurisdiction. *Berkshire Fashions, Inc. v. The M.V. Hakusan II*, 954 F.2d 874, 886-887 (3d Cir. 1992) (after dismissal there is no prohibition against asserting another basis for jurisdiction in an amendment to a pleading, provided that such jurisdiction would have existed at the time the complaint was originally filed); *United Steelworkers of America v. Mesker Bros. Industrial, Inc.*, 457 F.2d 91, 93 (8th Cir. 1972) (under Rule 15(a) leave to amend should be freely granted when necessary to establish jurisdiction following dismissal of a complaint); *Whitmire v. Victus Ltd.*, 212 F.3d 885 (5th Cir. 2000) (section 1653 provides authority to allow plaintiff to cure jurisdictional defect after dismissal); *Taylor v. Beckas*, 424 F.2d 905, 906-907 (D.C. Cir. 1970) (federal rules of civil procedure accept the principle that the purpose of pleading is to facilitate a proper decision on the merits and reject the "syllogism: a court without jurisdiction cannot act; the complaint did not give the court jurisdiction; therefore the court was without power to allow the amendment"); *Stern v. Beer*, 200 F.2d 794, 795 (6th Cir. 1952) ("if jurisdiction actually existed from the facts at the time when the complaint was filed, even though not properly pleaded, the proper construction of Section 1653 . . . is that the formal defect in the pleadings did not deprive the Court of jurisdiction at the time when

the action was filed . . . ."). Accordingly, where an appellate order reverses a judgment and remands with an order to dismiss, the district court has discretion to allow curative amendments except where "the appellate court mandate either calls for or precludes amendment or if amendment would run counter to the appellate court mandate." *Rutherford v. U.S.*, 806 F.2d 1455, 1459-1460 (10th Cir. 1986).[3]

2. The Fourth Circuit's Interpretation Of The Scope Of Its Mandate Is In Conflict With This Court's *Quern-Sprague-Wells Fargo* Line Of Cases

Respondent states that the Fourth Circuit's decision does not present a direct conflict with this Court's *Quern-Sprague-Wells Fargo* line of cases because the Fourth Circuit's opinion in the instant case "discussed the matter in question" and then entered an order remanding the case for entry of an order of dismissal. Brief For The Respondent, p. 7. Contrary to Respondent's assertion, there are no decisions of this Court or other Circuit Courts that hold that alternative grounds for subject matter jurisdiction not at issue on appeal are within the scope of a Circuit Court mandate.

The *Quern-Sprague-Wells Fargo* line of cases identifies the basic legal principles which should be applied in determining the scope of the Fourth Circuit's mandate of dismissal. The mandate rule is based on sound policy that,

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[3] *Stamper v. Baskerville*, 724 F.2d 1106 (4th Cir. 1984), upon which the Fourth Circuit relied, did not involve any issue related to amendment of pleadings, but rather involved an attempt on remand to supplement the record in order to create jurisdiction.

when an issue is litigated and decided, that should be the end of the matter. For more than a century it has been well-established law that the scope of an appellate mandate is limited to those specific questions that were directly at issue and decided by the higher court, and does not compel the entry of judgment on issues which were not at issue on appeal and/or not decided by the appellate court. *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 532 (7th Cir. 1982), *cert. denied*, 459 U.S. 1226 (1983) *citing Southern R. Co. v. Clift*, 260 U.S. 316, 319, 43 S. Ct. 126, 127, 67 L. Ed. 283 (1922) (the mandate rule is a "rule of practice" which is distinguishable from the doctrine of *res judicata* which would compel judgment). On remand the district court "may consider and decide any matters left open by the mandate." *Quern v. Jordan*, 440 U.S. 332, 348, 99 S. Ct. 1139, 1149, 59 L. Ed. 2d 358, 371 (1979) *quoting In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256, 16 S. Ct. 291, 40 L. Ed. 414 (1895).

In determining the scope of the appellate court's mandate, it is critical to determine what issues were actually decided by examining the procedural posture of the case, excluding any non-binding determinations expressed in the form of observations, commentary, or mere-*dicta* touching upon issues not formally before the court. *Gertz v. Robert Welch, Inc.*, 680 F.2d at 533. In the instant case the Fourth Circuit held that the *McAnnulty* Doctrine was a doctrine of equity jurisdiction apart from the Administrative Procedure Act (APA), which it chose not to address.[4]

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[4] In the Fourth Circuit's February 11, 2004 decision, the Court stated in a footnote as follows:

> Invention Submission also seeks to justify the federal court's jurisdiction on its general equity jurisdiction . . . the 'McAnnulty Doctrine' . . . [but that the *Industrial Safety* case relied

(Continued on following page)

Under the *Quern-Sprague-Wells Fargo* mandate standard, the fact that the *McAnnulty* Doctrine was not directly at issue renders the matter open, and on remand the district court possessed discretion to allow curative amendment to assert the *McAnnulty* Doctrine as an alternate basis for the court's subject matter jurisdiction.[5] *See Sanford Fork & Tool, supra* (plaintiff's right to make curative amendments is a matter which is left open where the sufficiency of the pleading is challenged); *see also, Rutherford v. U.S., supra.*

> upon to make this argument] did not discuss **the 'McAnnulty Doctrine,' a doctrine of equity jurisdiction apart from the APA....** For these reasons, we do not address whether the 'McAnnulty Doctrine,' which Invention Submission raises for the first time on appeal, provides a basis for judicial review of unlawful agency action.

Invention Submission Corp. v. Rogan, 357 F.3d 452, 457 (4th Cir. 2004) *citing American School of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 23 S. Ct. 33, 47 L. Ed. 90 (1992); App. 29 [emphasis added].

[5] Respondent attempts to avoid the clear conflict created by the Fourth Circuit's interpretation of its mandate to dismiss by incorrectly stating that the holding of the Fourth Circuit's February 11, 2004 opinion is that Petitioner waived its right to assert subject matter jurisdiction under the *McAnnulty* Doctrine and that Petitioner essentially seeks "a second bite at the apple." Brief For The Respondent, p. 10. The issue of waiver was not addressed in the Fourth Circuit's February 11, 2004 opinion. In connection with waiver, the Fourth Circuit in its June 24, 2005 opinion explained that the footnote in its prior opinion " . . . simply took note that Invention Submission had not properly raised the *McAnnulty* doctrine as a jurisdictional basis before the district court and therefore had not preserved that issue for consideration on appeal." App. 9. The Fourth Circuit further explained that had the district court considered its footnote to be an instruction to consider the *McAnnulty* Doctrine on remand, the district court would have violated the dismissal order which terminates the court's authority to take any further action.

The Fourth Circuit did not interpret the scope of its mandate in a manner consistent with the *Quern-Sprague-Wells Fargo* mandate standard. Instead, the Circuit Court adopted the view of Circuit Judges Ervin and Butzner in *Stamper v. Baskerville, supra,* who concluded that issues not before the appellate court should not be treated as "a matter left open." *ISC v. Dudas*, 413 F.3d at 415; App. 9. This holding is founded on a questionable interpretation of *In re Sanford Fork and Tool Company*[6] and presents a direct conflict with the Seventh Circuit's decision in *Gertz,*

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[6] In *Stamper v. Baskerville*, Circuit Judge Ervin stated in his opinion in which Senior Circuit Judge Butzner joined that "we [do not] believe that *In re Sanford* should be read to permit a lower court to treat an issue not before the appellate court as 'a matter left open.'" 724 F.2d at 1108. However, this statement does not appear to be grounded on anything contained in this Court's opinion in that case. On the contrary, it appears that as early as 1895 this Court recognized that the right to amend is left open on remand. In *Sanford Fork & Tool,* plaintiff challenged the sufficiency of defendant's answer to plaintiff's bill seeking to set aside a mortgage. The district court entered a final decree adjudicating the mortgage as being void. On appeal, this Court reversed, holding that the mortgage was valid. On remand the district court recognized that the issue on appeal was limited to the sufficiency of defendant's answer and therefore this Court's mandate did not foreclose plaintiff from exercising its procedural rights to amend the bill. Thereafter, the Circuit Court denied defendant's motion for the entry of a final decree and granted plaintiff leave to amend.

Defendant again appealed to this Court. In response, this Court stated that the scope of its mandate is dependent on the procedural posture of the case: " . . . what was heard and decided by the Circuit Court in the first instance, and by this court upon the appeal . . . bear[ing] in mind the settled practice of courts . . . recognized and regulated by the rules. . . ." *Sanford Fork & Tool*, 160 U.S. 247, 256. This Court therefore affirmed the Circuit Court's application of the mandate rule; concluding that this Court's finding of a valid mortgage did not entitle defendant to the entry of a final decree because the scope of the mandate was limited by the procedural posture of the case and by general rules of practice which afforded plaintiff the right to amend. *Id.* at 259.

the Tenth Circuit's decision in *Rutherford*, and the basic legal principles which should be applied in determining the scope of the court's mandate under the *Quern-Sprague-Wells Fargo* mandate standard.

3. Respondent Can Not Avoid The Conflict Created By The Fourth Circuit's Decision By Ignoring The Record

As discussed above, the right on remand to amend to plead alternate grounds of subject-matter jurisdiction not at issue and not decided by the appellate court is not only unaffected by the mandate rule, but expressly authorized by Rule 15 in conjunction with § 1653. In an attempt to avoid the conflict with other Circuits created by the Fourth Circuit's decision in the instant case, Respondent attempts to recast the record below – asserting that the issue before the Fourth Circuit was whether Petitioner had stated a valid "cause of action." Brief For The Respondent, p. 12. In so arguing, Respondent states that "Section 1653 'does not allow a plaintiff to amend its complaint to substitute a new cause of action over which there is subject-matter jurisdiction for one in which there is not.'" *Id.*, pp. 10-12.

The sufficiency of the substantive allegations contained in Petitioner's complaint were never at issue. The record establishes that the Respondent only challenged the sufficiency of the jurisdictional allegations. Respondent's Motion to Dismiss stated,

> COMES NOW the defendant James E. Rogan, Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and

> Trademark Office by Assistant U.S. Attorney Rachel C. Ballow and presents fis (sic) Motion to Dismiss the Complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

Contrary to Respondent's representation to this Court, the Fourth Circuit did not "affirm" the district court's determination that Petitioner's complaint failed to state a cause of action. The Fourth Circuit did not make a determination on the merits, nor did it agree with the district court's decision, *sua sponte*, to treat Respondent's motion as an attack on the merits. In vacating the decision of the district court, the Fourth Circuit stated that the district court had erred in "evaluat[ing] the complaint under Rule 12(b)(6) and should have dismissed this case under Rule 12(b)(1)." *ISC v. Rogan*, 357 F.3d at 460; App. 36.

Respondent now attempts to overcome the actual record by arguing that *McAnnulty* is not a doctrine of equity jurisdiction separate from the APA, which is opposite from the theory Respondent previously advocated and which was accepted by the Fourth Circuit. Respondent has changed its position, and now states that *McAnnulty* "would merely supply a cause of action for judicial review of agency action, not an independent basis for subject-matter jurisdiction." Brief For The Respondent, p. 12. On this basis Respondent states, "the premise of petitioner's argument – that *McAnnulty* provides an 'alternative ground for jurisdiction' as to which Section 1653 applies . . . is incorrect." Brief For The Respondent, p. 10. As stated above, this is contrary to Respondent's position taken throughout this case, and contrary to the Fourth Circuit's determination that *McAnnulty* represents "a doctrine of equity jurisdiction apart from the APA." *ISC v. Rogan*, 357 F.3d at 457; App. 29.